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No. 61-1365

IN THE

Supreme Court of the United States

October Term 1961

BRUCE KING, Governor of the State of New Mexico, and SHIRLEY HOOPER, Secretary of State of the State of New Mexico,

Appellants,

vs.

FRANK I. SANCHEZ, et al., RAYMOND VARGAS, et al., D.H. "CHILI" YAZZIE, et al., RONALD G. OLGUIN, et al., and PATRICIA M. MARSH,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION OF APPELLEES FRANK I. SANCHEZ, ET AL. AND D. H. "CHILI" YAZZIE, ET AL. TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether, in holding unconstitutional the January, 1982 New Mexico legislative reapportionment, the District Court clearly erred in finding that population deviations ranging to 83% in the House and 94% in the Senate failed to satisfy the one-person, one-vote rule and violated the test of *Burns* v. *Richardson*, 384 U.S. 73, 93 (1966) that there be no substantial difference in result by using a basis for reapportionment other than population.

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No. 81-2385

IN THE

Supreme Court of the United States

October Term 1981

BRUCE KING, Governor of the State of New Mexico, and SHIRLEY HOOPER, Secretary of State of the State of New Mexico,

Appellants,

vs.

FRANK I. SANCHEZ, et al., RAYMOND VARGAS, et al., D.H. "CHILI" YAZZIE, et al., RONALD G. OLGUIN, et al., and PATRICIA M. MARSH,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of this Court's rules and by undersigned counsel, Appellees Frank I. Sanchez, et al. and D. H. "Chili" Yazzie, et al., respectfully move that this appeal be dismissed as moot and alternatively that the judgment of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINIONS BELOW

The April 5, 1982, opinnion and order of the District Court, granting a preliminary injunction, J.S. App. at A-1 -

A-3, is unreported. The April 8, 1982, opinion and order of the District Court, adjudicating the 1982 New Mexico legislative reapportionment unconstitutional, J.S. App. at B-1 - B-4, is also unreported.

JURISDICTION

The orders of the District Court, J.S. App. at A-1 - A-3 and B-1 - B-4, were entered on April 5 and 8, 1982. The notice of appeal, J.S. App. at C1 - C-2, was filed by Defendants on April 29, 1982. The appeal was docketed in this Court on June 28, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

STATEMENT

Your Appellees, Frank I. Sanchez, et al., and D. H. "Chili" Yazzie, et al., fully join and concur in the Motion to Affirm filed herein by Appellees Raymond Vargas, et al., and will not repeat here the detailed arguments of that pleading. Rather, your Appellees will supplement and highlight that pleading.

This case is a simple one. In January, 1982, the New Mexico Legislature redistricted using a votes-cast formula to project the 1980 population of precincts. These precincts were then combined to form legislative districts. At trial, Plaintiffs produced expert testimony to demonstrate that when measurd by actual population, the deviations of the districts ranged to 83% in the House and 94% in the Senate and that the most under-represented districts were those with the highest concentrations of minority (Black, Indian, Mexican-American) population. The Defendants did not seriously contest this evidence, but urged that their legitimate interest in excluding ineligibles (aliens, institutionalized persons, transient military, etc.) from the reapportionment base was accom-

plished by the votes-cast formula. However, Defendants failed to produce any substantial evidence that their formula in fact promoted this goal. The District Court did not have to reach the question of the legitimacy of the state's purported goal of excluding ineligible voters from the apportionment base, since it was able to conclude as a factual matter that the votes-cast formula did nothing to promote the accomplishment of that goal.

Accordingly, upon these facts the District Court had little difficulty in declaring the January, 1982 reapportionment invalid. As a remedy, the District Court directed that the Legislature reapportion using actual 1980 Census population to compute the populations of precincts, which could then be combined to form districts of equal population.

ARGUMENT

The judgment of the District Court should be dismissed as moot or alternatively should be summarily affirmed because it was based upon factual findings and factual application of a clear mandate of this Court, and does not raise issues of the stature which would make appropriate plenary review by this Court.

I

THIS APPEAL SHOULD BE DISMISSED FOR MOOTNESS

The Defendants noticed appeal from the district court's order on April 29, 1982. However, the Defendants-Appellants did not move for a stay of the district court's order in this Court, but have proceeded to enact another plan. Subsequent to the district court's order, the Defendants contracted with the Census Bureau and other experts and obtained computations of the 1980 Census population

by precincts. Using this accurate precinct population data, the New Mexico Legislature went into special session in June, 1982 and produced plans for the House and the Senate. Under the provisions of these June, 1982 Acts, special primary elections for the Legislature are to be conducted on August 31, 1982 pursuant to the new plans.

The Plaintiffs have renewed their challenges of racial discrimination in the delineation of certain district lines in four areas of the state with respect to the House (but not the Senate) under the June, 1982 plan. The Plaintiffs did not challenge the accuracy of the new precinct population data. The district court conducted a trial on the gerrymandering challenges beginning on August 4, 1982 and presently has the case under advisement.

The Defendants-Appellants by not seeking a stay in this Court, by enacting a new legislative redistricting plan, and by providing for the election of a legislature under this new plan, have rendered the issue of this case stale and its outcome inconsequential.

The June, 1982 Acts do provide for repeal in the event this Court would uphold the January, 1982 plan. However, this breathes only most uncertain future life into the issues of the January, 1982 plan because a new Legislature will be elected in 1982 pursuant to the later enacted plan. The Defendants-Appellants appear to be asking this Court to issue an advisory opinion and are seeking plenary review only, in their words: "because the issues are of great importance to the State of New Mexico in *planning future elections.*" J.S. at 6 (emphasis added).

By the time this case reaches the Court, a new Legislature will have been elected and be sitting pursuant to

the June, 1982 plan (based on accurate 1980 population data) and the district court will have issued a ruling as to the validity of the House districts challenged by Plaintiffs in the second round of litigation. If these considerations do not render the case moot, they argue most strongly for a quick resolution of the insubstantial claims of Defendants-Appellants. A determination of mootness or a summary affirmance of the unconstitutionality of the January, 1982 plan would close that chapter of the 1980 round of New Mexico Legislative redistricting, and clear the air and the dockets of this stale battle.

II

THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT DEVIATIONS OF 83% IN THE HOUSE AND 94% IN THE SENATE FAILED TO SATISFY THE ONE-PERSON, ONE-VOTE RULE AND THE CRITERIA OF *BURNS* v. *RICHARDSON*, 384 U.S. 73, FOR LEGISLATIVE PLANS NOT BASED ON POPULATION.

Appellants, in an attempt to obtain plenary review, mischaracterize the holding of the district court to imply that it is contrary to the rule of law announced in *Burns* v. *Richardson*, 384 U.S. 73 (1966). On the contrary, the district court most scrupulously followed the dictates of *Burns*, but made factual findings (including deviation ranges of 83% and 94%) which under *Burns* required a holding of unconstitutionality of the January, 1982 plans. These findings should not be disturbed unless clearly erroneous under Fed. Rule Civ. Pro. 52. *Rogers* v. *Lodge* 50 U.S.L.W. 5041, 5045 (III A) (U.S. July 1, 1982).

Burns v. *Richardson, supra*, supported by the dicta in *Gaffney* v. *Cummings*, 412 U.S. 735, 746-49 (1973), requires

that before a population base more narrow than total population may be employed, the state must prove: 1) that there exists "special population problems" necessitating departure from a total population base, 2) that the method employed substantially duplicates the result that would be obtained by employing a permissible population base, 384 U.S. at 95, and 3) that the data and method employed does not have an adverse impact on minorities by underrepresenting "groups constitutionally entitled to participate in the electoral process", 384 U.S. at 92-93. See also, *Ely* v. *Klahr*, 403 U.S. 108 (1971).

The district court did not dispute the three rquirements of *Burn;*, rather, it found facts in the instant case, which, *pursuant* to the *Burns* criteria, required finding a violation of the one-person, one-vote rule.

At trial, the Defendants offered no "special population problems" akin to those of Hawaii in 1966, and the fact that Defndants have now obtained accurate population figures by precincts suggests that any practical difficulties that they may have experienced could have been easily overcome.

Similarly, the Defendants offered no study or other testimony to demonstrate that the votes-cast formula approximated some permissible population base. Plaintiffs produced data which demonstrated that when measured by the usual base, total population, the districts of Defendants' plan were grossly unequal, having a deviation range of 83% in the House and 94% in the Senate.

With respect to the third criteria, evidence by several of Plaintiffs' expert witnesses established that the brunt of the inaccuracies of the votes-cast formula was borne

by New Mexico's minorities. The most underrepresented districts consistently contained the highest percentage of minority population and the most overrepresented districts consistently contained the lowest percentage of minority population.

The district court, applying the criteria of *Burns* v. *Richardson*, *supra*, and cognizant of the admonition of *Mahan* v. *Howell*, 410 U.S. 315, 326 (1973), found facts which required a holding of unconstitutionality of the January, 1982 New Mexico legislative reapportionment.

CONCLUSION

The decision of the district court is a straightforward application of a clear rule of law and turns on the factual findings of the trial court. The case does not raise the type of issue which would warrant the Court's plenary consideration and is thoroughly stale if not moot, by virtue of the Legislature's June, 1982 enactments.

Accordingly, your Appellees respectfully urge that this case be dismissed as moot, and alternatively that the decision below be summarily affirmed without full briefing and oral argument.

Respectfully submitted,

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CERTIFICATE

I, Stanley A. Halpin, Jr., Attorney for Appellees and a member of the Bar of the United States Supreme Court, do hereby certify that on this 30th day of August, 1982, I served three copies of the foregoing Motion to Dismiss or Affirm, by mail, postage prepaid to the attorneys of record herein:

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